Supreme Court, U.S.
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No. 95-1575

In the Supreme Court of the United States

OCTOBER TERM, 1995

REGINALD D. MCGLORY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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13 pp

QUESTIONS PRESENTED

1. Whether the Double Jeopardy Clause prohibits a civil proceeding for the *in rem* forfeiture of property alleged to be the proceeds of narcotics and money laundering activities when the owner of the property has previously been prosecuted for, and convicted of, narcotics and money laundering crimes.

2. Whether petitioner's failure to file a claim in two forfeiture proceedings precludes a finding that he was placed in jeopardy or suffered punishment as a result of those forfeitures.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 72 F.3d 1160.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1995. The petition for a writ of certiorari was filed on March 28, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted of conspiring to distribute heroin, in violation of 21 U.S.C. 846; possessing heroin with intent to distribute it, in violation of 21

U.S.C. 841(a)(1); being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1); using a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1); and laundering drug proceeds, in violation of 18 U.S.C. 1956(a)(1)(A)(i). Pet. App. 4a; Gov't C.A. Crim. Br. 6. He was sentenced to life imprisonment. See *United States* v. *McGlory*, 968 F.2d 309, 315 (3d Cir.), cert. denied, 506 U.S. 956, 1009 (1992), and 507 U.S. 962 (1993). The court of appeals affirmed. *Ibid.*

Meanwhile, the United States filed a complaint for civil forfeiture of $184,505.01 on November 21, 1989; a complaint for civil forfeiture of $14,584.50 on February 7, 1990; and a complaint for civil forfeiture of various statues on February 28, 1990. Pet. App. 4a-5a.[1] The district court entered a default judgment in each proceeding. *Id.* at 5a. The district court subsequently denied petitioner's motions to set aside the default judgments. *Ibid.* The court of appeals affirmed with respect to the $184,505.01, but reversed with respect to the other two forfeitures. *Id.* at 1a-21a.

1. On September 8, 1989, as part of a criminal investigation of petitioner, federal officials executed a search warrant at an address on Bryn Mawr Road in Pittsburgh, where petitioner was believed to reside. Pet. App. 3a, 5a-6a n.7; Gov't C.A. Civ. Br. 7 & n.1. Government agents seized narcotics paraphernalia containing heroin residue. *McGlory*, 968 F.2d at 320. The government also seized $14,584.50 in cash, some

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[1] The court of appeals refers to "three" statues. Pet. App. 3a. From the Complaint for Forfeiture, however, it appears that only two statues were involved. C.A. Civ. App. 14; see Pet. App. 1a (caption).

statues, and a separate collection of $184,505.01 in cash. Pet. App. 3a-4a. The United States began separate administrative forfeiture proceedings against the $14,584.50 and the statues. *Id.* at 4a. Petitioner's wife and mother filed administrative claims to the $14,584.50 and the statues, respectively. *Ibid.* Those forfeitures were then referred to the United States Attorney, who filed civil forfeiture complaints on February 7, 1990, for the $14,584.50 and on February 28, 1990, for the statues. *Ibid.* The government served petitioner with the two forfeiture complaints at the Bryn Mawr Road address. *Ibid.*

The $184,505.01 in cash was referred initially to the United States Attorney to initiate judicial forfeiture proceedings, because it exceeded the $100,000 maximum for administrative forfeiture. Pet. App. 4a n.5. On November 21, 1989, the United States filed a civil forfeiture complaint for the $184,505.01. *Id.* at 5a. Petitioner was served with the complaint at the Bryn Mawr Road address, and his criminal attorney was also served. *Ibid.*

Meanwhile, on October 4, 1989, petitioner was indicted. C.A. Civ. Supp. App. 186. The jury trial in petitioner's criminal case began on April 25, 1990. *Id.* at 200. Petitioner was convicted on May 16, 1990 (*id.* at 201) and was sentenced to life imprisonment on February 12, 1991 (*id.* at 206).

Petitioner failed to file a claim or answer in any of the three civil forfeiture actions. Pet. App. 5a. Default judgments were entered against petitioner for the $14,584.50 and the statues on May 29, 1990, and July 23, 1990, respectively. *Ibid.* Petitioner moved to set aside those default judgments on April 21, 1994. Gov't C.A. Civ. Br. 6. The district court denied those motions on November 14, 1994. *Ibid.*

On March 26, 1990, the government obtained a default judgment for the $184,505.01. Pet. App. 5a; C.A. Civ. Supp. App. 111. Petitioner's attorney then filed a claim of ownership for petitioner and a motion to set aside the default judgment for the $184,505.01. Pet. App. 5a. The district court set aside that default judgment. *Ibid.* When petitioner again failed to file an answer to the forfeiture complaint, however, the court entered another default judgment on April 12, 1991. *Ibid*; Gov't C.A. Civ. Br. 5. Petitioner moved to set aside that default judgment on July 15, 1994. Pet. App. 5a. The court denied that motion on August 8, 1994. *Ibid*; Gov't C.A. Civ. Br. 5.

2. On appeal, petitioner contended that the government had violated his due process rights by failing to provide him with adequate notice of the civil forfeiture proceedings against the $14,584.50 and the statues. Pet. App. 5a. The court of appeals agreed, stating that the government was required to "make an attempt to serve [petitioner] with notice of the forfeiture proceedings in prison." *Id.* at 6a. Although petitioner had received notice of the administrative forfeitures while in prison, the court of appeals determined that he had not received adequate notice of the subsequent judicial proceedings. *Id.* at 7a. The court of appeals added that for purposes of the civil forfeiture proceedings against the $14,584.50 and the statues, service on petitioner's criminal attorney was not adequate to constitute actual notice to petitioner. *Id.* at 8a.

Petitioner also contended that because the forfeitures of the statues and the $184,505.01 came after the forfeiture of the $14,584.50, and because the forfeiture of the $184,505.01 came after jeopardy had attached in petitioner's criminal case, those for-

feitures constituted multiple punishments for the same offense, in violation of the Double Jeopardy Clause of the Fifth Amendment. Pet. App. 8a.[2] The court of appeals rejected petitioner's double jeopardy argument on three grounds.

First, the court of appeals held that because petitioner had never filed a claim in the forfeiture proceedings against the $14,584.50 and against the statues, he was never placed "in jeopardy" in those proceedings. Pet. App. 12a-14a. Relying on decisions rejecting the double jeopardy claims of defendants who had not participated in earlier administrative forfeitures, the court of appeals held that the logic of those cases extended to the claims of parties who do not participate in judicial forfeiture proceedings. *Ibid.* See *United States* v. *Torres*, 28 F.3d 1463 (7th Cir.), cert. denied, 115 S. Ct. 669 (1994); *United States* v. *Arreola-Ramos*, 60 F.3d 188 (5th Cir. 1995); *United States* v. *Baird*, 63 F.3d 1213 (3d Cir. 1995), cert. denied, 116 S. Ct. 909 (1996).

Second, the court of appeals held that none of the forfeitures constituted "punishment" under the multiple punishments prong of the Double Jeopardy Clause. Pet. App. 15a-17a. The court adopted (*id.* at 15a) the reasoning of *United States* v. *Tilley*, 18 F.3d 295 (5th Cir.), cert. denied, 115 S. Ct. 573, 574 (1994), while "reject[ing] the contrary reasoning and conclusion of the Ninth Circuit" in *United States* v. *$405,089.23 in United States Currency*, 33 F.3d 1210 (9th Cir. 1994), amended, 56 F.3d 41 (9th Cir. 1995), cert. granted, 116 S. Ct. 762 (1996) (No. 95-346) (argued Apr. 17, 1996). Pet. App. 16a.

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[2] The relevant dates for the court of appeals' double jeopardy discussion are set forth in Pet. App. 8a-9a n.11.

Finally, the court of appeals applied the test set forth in *Blockburger* v. *United States*, 284 U.S. 299 (1932), and *United States* v. *Dixon*, 509 U.S. 688 (1993), and determined that the challenged forfeitures were not based on the "same offense" as petitioner's criminal conviction. Pet. App. 17a-20a. The court explained that the criminal conviction required proof that petitioner had participated in a conspiracy or that he possessed a controlled substance, but that the forfeitures under 21 U.S.C. 881(a)(6) did not require proof of either of those elements. Pet. App. 20a. Conversely, the forfeitures, unlike the criminal conviction, required proof of a sale or exchange and proof that the forfeited property "was proceeds of, or traceable to, a sale or exchange." *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 7-16) that the civil forfeiture of his property violated his double jeopardy rights. The proceedings in the court of appeals involved three distinct forfeitures: (a) the forfeiture of $14,584.50 in cash, (b) the forfeiture of two or three statues (see note 1, *supra*), and (c) the forfeiture of $184,505.01 in cash. Only the last of those forfeitures, however, is directly at issue in this Court. The court of appeals reversed the judgments of the district court with respect to the first two forfeitures on the ground that the government had failed to provide petitioner with adequate notice, and the United States has not sought further review of that aspect of the court of appeals' decision.

The court of appeals affirmed the forfeiture of the $184,505.01, however, on the grounds that (1) the forfeiture did not constitute "punishment" under the multiple punishments prong of the Double Jeopardy

Clause, see *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969); and (2) the forfeiture was not based on the "same offense" as petitioner's criminal conviction. See Pet. App. 15a-20a. As petitioner points out (Pet. 8), those issues are currently before the Court in *United States* v. *Ursery*, No. 95-345 (argued Apr. 17, 1996), and *United States* v. *$405,089.23 in United States Currency*, No. 95-346 (argued Apr. 17, 1996). The petition for a writ of certiorari should therefore be held pending the Court's decisions in *Ursery* and *$405,089.23*, and disposed of as appropriate in light of those decisions.[3]

2. Petitioner also challenges (Pet. 19-23) the court of appeals' conclusion that "[a] forfeiture proceeding in which a party does not participate does not place that party in jeopardy, and therefore that party cannot use that forfeiture as the basis of a double jeopardy challenge to a subsequent proceeding." Pet. App. 12a-13a. Consistent with the analysis of the Third Circuit in the instant case, every court of appeals that has considered the issue has held that a person who does not contest the forfeiture of property cannot claim to have suffered punishment as a result

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[3] The Court's resolution of *Ursery* and *$405,089.23* may also have an indirect effect on petitioner's interests in the $14,584.50 in cash and the statues that were the subjects of the other two forfeiture proceedings. Although the court of appeals reversed the judgments of forfeiture with respect to those items, its decision would appear to leave open the possibility that the government could initiate new forfeiture proceedings against those properties, so long as proper notice is given. Were this Court to decide *Ursery* and *$405,089.23* adversely to the government, however, its decision could preclude the government from initiating new forfeiture proceedings against those properties.

of that forfeiture. See *United States* v. *German*, 76 F.3d 315, 317-320 (10th Cir. 1996); *United States* v. *Idowu*, 74 F.3d 387, 392-396 (2d Cir.), cert. denied, No. 93-8843 (June 3, 1996); *United States* v. *Sykes*, 73 F.3d 772 (8th Cir.), cert. denied, No. 95-1824 (June 3, 1996); *United States* v. *Cretacci*, 62 F.3d 307, 310-311 (9th Cir. 1995), cert. denied, No. 95-7955 (June 17, 1996); *United States* v. *Arreola-Ramos*, 60 F.3d 188, 192 (5th Cir. 1995); *United States* v. *Torres*, 28 F.3d 1463, 1465 (7th Cir.), cert. denied, 115 S. Ct. 669 (1994).[4] This Court has recently denied several petitions for a writ of certiorari that presented the question whether a criminal conviction following an administrative or other uncontested forfeiture violated the Double Jeopardy Clause.[5]

In any event, the court of appeals' analysis of this issue did not affect its ultimate disposition of the case. With respect to the forfeitures of the $14,548.50 and the statues, the court reversed the district court judgments on the ground that petitioner had failed to receive adequate notice. In affirming the judgment of forfeiture of the $184,505.01, the court did not treat that forfeiture as uncontested, presumably because petitioner did file a claim of ownership to that money (though he subsequently failed to file an answer to

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[4] The government's argument on this issue is set forth in greater detail in (*inter alia*) our brief in opposition to the petition for a writ of certiorari filed in *Plunk* v. *United States*, No. 95-1243 (cert. denied May 13, 1996). We have provided counsel for petitioner with a copy of our brief in *Plunk*.

[5] See, *e.g.*, *Baird* v. *United States*, 116 S. Ct. 909 (1996); *Penny* v. *United States*, 116 S. Ct. 931 (1996); *Nakamoto* v. *United States*, 116 S. Ct. 1357 (1996); *Menken* v. *United States*, No. 95-1036 (May 13, 1996); *Plunk* v. *United States*, No. 95-1243 (May 13, 1996).

the forfeiture complaint within the time allotted by the district court). See Pet. App. 5a, 8a-9a n.11, 12a, 14a. The court of appeals' affirmance of the district court was based instead on its conclusions that the forfeiture "did not constitute 'punishment'" for purposes of double jeopardy analysis, *id.* at 15a, and that it was not "predicated on the 'same offense' as that which formed the grounds for the earlier forfeiture or [petitioner's] criminal conviction," *id.* at 17a.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of *United States* v. *Ursery*, No. 95-345, and *United States* v. *$405,089.23 in United States Currency*, No. 95-346, and disposed of as appropriate in light of the Court's decisions in those cases.

Respectfully submitted.

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